

LOW SOOK YEE**A****v.****GALAXY MUSIC SDN BHD**

HIGH COURT MALAYA, KUALA LUMPUR

B

HASNAH HASHIM J

[SUIT NO: 22NCC-2050-12-2011]

11 OCTOBER 2012

EQUITY: *Contract - Unconscionable transaction - Representations made to promote plaintiff as international artist - Payment of money - Unfair and unconscionable transaction - Whether proven - Whether defendant took advantage of plaintiff's weakness - Whether efforts made by defendant to promote plaintiff - Whether communications between parties induced plaintiff to enter agreement - Whether agreement ought to be set aside*

C**D**

The plaintiff, upon winning RM1 million in a competition organised by 8TV, was given RM330,000 whereas the balance of RM670,000 was retained by 8TV as expenses for her career development. Immediately thereafter, the plaintiff entered into a recording agreement with 8TV for a term of one year. Subsequent to that, the plaintiff entered into an Artist Management Agreement with Tiga Events Sdn Bhd. Upon the expiry of the agreement with Tiga Events, the plaintiff began discussions with the defendant as she was keen to further her career in the Chinese music industry. Acting on representations made by the defendant, the plaintiff entered into an agreement with the defendant. Pursuant to the agreement, it was agreed that the plaintiff would forward the sum of RM367,575 to the defendant and in return, the defendant would handle the management duties including recording, producing, managing, marketing, promotion and distribution of an international Chinese album in Taiwan, China and Hong Kong, the costs of which would be set off from the sum forwarded. Although the Chinese album was produced and released, the plaintiff was not given any details as to the distribution and the sales figures of the album and neither was the album released in Taiwan, China and Hong Kong. Hence, the plaintiff claimed for the return of the sum of RM367,575 forwarded to the defendant.

E**F****G****H****I**

A Held (allowing plaintiff's claim with costs):

- (1) The facts and evidence disclosed that there were communications between the defendant and the plaintiff which had induced the plaintiff to enter into the agreement and releasing the said amount to the defendant. Unfortunately, no specific provision was incorporated in the agreement. (para 28)
- (2) The agreement entered between the plaintiff and the defendant was partisan to one party and heavily one sided. Most of the provisions seemed to give the defendant anything and everything. The agreement allowed so much freedom as it were to the defendant to do everything under the sun and the plaintiff was left with such onerous provision that it was so pervasive to any normal sense of just and fair play. (para 29)
- (3) The representations made by the defendant to promote the plaintiff as an international Chinese artist were not in any way or form reflected in any of the provisions in the agreement. Nor were there any provision for the payment of the sum or the purpose of the payment. There was also nothing relating to the production of the album. The purported recording agreement between alternate music and the defendant was never tendered by the defendant as evidence. (para 29)
- (4) Whether or not "unconscionability" had been made out is largely dependent on the facts of each case. In every case where "unconscionability" was made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith. On the facts, there was an element of unfairness on the part of the defendant. The plaintiff was taken advantage of by the defendant and the evidence clearly pointed out that there was a gross unfairness and unequal bargaining powers. (paras 35, 41 & 42)

Case(s) referred to:

- Alec Lobb (Garages) Ltd & Ors v. Total Oil GB Ltd* [1985] 1 All ER 303 (refd)
- Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232 CA (refd)
- Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 FC (refd)
- Commercial Bank of Australia Ltd v. Amadio and Another* [1983] 46 ALR 402 (refd)

- Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614 HC (**refd**) A
- Lloyds Bank v. Bundy* [1975] QB 326 (**refd**)
- Min Thai Holdings Pte Ltd v. Sunlable Pte Ltd & Anor* [1999] 2 SLR 368 (**refd**)
- Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 FC (**refd**) B
- Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 CA (**refd**)
- Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611 HC (**refd**)
- Standard Chartered Bank Malaysia Bhd v. Foreswood Industries Sdn Bhd & Anor* [2004] 6 CLJ 320 HC (**refd**) C
- Sulisen Sdn Bhd v. Kerajaan Malaysia* [2006] 7 CLJ 247 HC (**refd**)
- Other source(s) referred to:**
- Halsbury's Law of England*, 3rd edn, vol 17, 1956, p 682
- For the plaintiff - Yudistra Dharma (Ong Yu Jian with him); M/s Raj, Ong & Yudistra* D
- For the defendant - Ricky Tan (Marcus Tan, Susan Low, Wong Leong Kok, Siti Aishah with him); M/s Ricky Tan & Co*
- Reported by Kok Fie See* E

JUDGMENT

Hasnah Hashim J:

Background

[1] In 2006 at the age of 16 the plaintiff won a television competition known as 'One in a Million'. The competition was organised by Metropolitan TV also known as 8TV ('8TV'). 8TV became her record label after she won. Eventually 8TV then passed the record label responsibility to Alternate Records Sdn Bhd also known as 'Monkey Bone'. As the winner of the competition she won RM1 million. She was given RM330k and the balance of RM670k was retained by 8TV as expenses for her career development. The money was kept in a joint account by 8TV and the plaintiff. G H

[2] Immediately after winning the competition the plaintiff entered into a recording agreement dated 23 November 2006 with 8TV under the record label called 'Monkey Bone' ('the recording agreement'). The term of the agreement was for an initial period of one year ending in November 2008. Under the said agreement I

- A 8TV has the exclusive right to call the plaintiff to perform and make recordings, to reproduce the plaintiff's voice from the sound recordings and to sell and distribute the record products. 8TV was the sole and exclusive owner of all rights including but not limited to copyright and all derivative rights in the nature of copyright.
- B It was also expressly stipulated under the aforesaid agreement that the balance of RM670k (67% of the prize money) shall be used for the marketing, distribution and other exploitation cost under the agreement. There is also a clause on the payment of royalties.
- C [3] The plaintiff then entered into an Artist Management Agreement with Tiga Events Sdn Bhd. Under the aforesaid agreement the plaintiff agreed to appoint Tiga Events as her sole and exclusive manager. Tiga Events managed the plaintiff's career. There is a specific provision on commission and fee for the manager.
- D
- E [4] Subsequently after the expiry of the agreement with Tiga Events sometime in 2008 the plaintiff began discussions with the defendant as she was keen to further her career in the Chinese music industry. She had discussions with Chris Wang the general manager of the defendant (DW5). The defendant told her that they would manage her career and record label.
- F [5] In the music industry the record label will be one that develops, records, produces, markets, promotes and make available the sales of the music of the artist. The record label will usually own the intellectual property of the artist's music.
- G [6] The general manager of 8TV at that time, Ms Lam Swee Kim (PW2) attended one of the discussions between the plaintiff and the defendant. In her evidence she confirmed that there were discussions between the parties and she was present at the introduction meeting. According to the plaintiff, the defendant told her that they would produce a Chinese album which would then be released and marketed internationally. This again was confirmed
- H by PW2 in her examination-in-chief. She said that the defendant did inform that they have connections in Taiwan and the initial meeting was about the plaintiff's career going beyond Malaysia.
- I [7] Acting on the representations made by the defendant, the plaintiff then entered into an agreement with the defendant to record, produce, manage, market, promote, distribute and/or make available for sale an international Chinese album for the plaintiff in consideration of the sum of RM367,575.

[8] Since the defendant did not record, produce, manage, market, promote, distribute and/or make available for sale an international Chinese album for the plaintiff in Taiwan, China and Hong Kong the plaintiff filed this claim for the return of the sum of RM367,575. **A**

[9] The plaintiff's claims are as follows: **B**

- (i) a declaration that the 1st Agreement is null and void and is liable to be set aside void *ab initio*; or
- (ii) alternatively, a declaration that there has been a total failure of consideration of the 1st Agreement; **C**
- (iii) consequently, an order setting aside, rescinding and/or repudiating the 1st Agreement;
- (iv) further consequently, an order for the immediate return of the sum of RM367,575.17 by the defendant to the plaintiff; **D**
- (v) a declaration that the 2nd Agreement is null and void and is liable to be set aside on grounds of mistake or under influence; or
- (vi) alternatively, a declaration that the 2nd Agreement constitutes an unconscionable transaction liable to be set aside; **E**
- (vii) consequently, an order setting aside, rescinding and/or repudiating the 2nd Agreement;
- (viii) general damages; **F**
- (ix) monies due and owing to the plaintiff by the defendant under the 2nd Agreement in the sum of RM15,200.00;
- (x) exemplary and/or aggravated damages; **G**
- (xi) interest at the rate of 8% per annum on the judgment sum from the date of judgment until the date of full settlement;
- (xii) costs; and
- (xiii) such further or other relief as this Honourable Court deems fit and just in the circumstances. **H**

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A Findings And Decision

Whether There Was An Agreement Between The Plaintiff And The Defendant (First Agreement) To Promote The Plaintiff As An International Artiste

B [10] To determine this, the court will have to look at the facts and the evidence before it. At the trial three written agreements were adduced as evidence as follows:

C (i) The first agreement is the agreement between 8TV and the plaintiff dated 23 November 2006. By this agreement 8TV engaged the plaintiff as a recording artist. 8TV will use the fund for the marketing, distribution and exploitation cost under the agreement. There is also a specific provision on payment of royalties. The term of contract was for one year.

D (ii) The second written agreement is the agreement between the plaintiff and Tiga Events Sdn Bhd. This is known as the Artiste Management Agreement. The term of the contract was for one year and six months commencing from 1 November 2006 – 30 April 2008.

E (iii) The third agreement is the agreement dated 10 April 2009 between the parties. The contract period was for four years commencing from the date of the agreement.

F [11] The plaintiff in her evidence said that pursuant to the third agreement it was agreed that she would forward the defendant the sum of RM367,575.15 and in return the defendant would handle the management duties. It was also agreed by the parties that the defendant would record, produce, manage, market, promote and distribute an international Chinese album in Taiwan, China and Hong Kong, the cost would then be set off from the sum forwarded;

G Galaxy Music, through Chris Wang told me that Galaxy Music would produce a Chinese album which would be released and marketed extensively in Chinese speaking countries like China and Hong Kong and especially, Taiwan.

H They assured me that the Chinese album would be become an international album with sales in Taiwan and possible other Chinese speaking countries.

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In order to achieve this, they assured me that they had a vast network of contacts who would facilitate album sales, organize concerts and such promotional events for the Chinese album.

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They also said that they would obtain international Chinese songwriters for me including the songwriter of the well-known Chinese singer A-Mei.

B

I was assured that all my photography would be done by the photographer of Jolin Tsai, another well known Chinese artiste.

I was also promised that they would arrange for collaborations with well known international Chinese artistes.

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[12] In her witness statement the plaintiff explained that the amount of RM670k was kept in a joint account operated by 8TV and the plaintiff. She also told the court that the money could be used by both parties.

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[13] The said sum was then paid to the defendant sometime in February 2010. When she was asked during cross-examination whether she knew the cost of the production of 'Ladies Nite' she responded:

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I was aware that I need to forward RM367,575.00 to Galaxy Music.

[14] The cheque of RM367,575 was signed by the plaintiff herself and Ahmad Izham Omar (8TV's CEO) (p. 307 A). The said cheque was signed in front of DW5 who, according to the plaintiff had asked her to sign the cheque.

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[15] The Chinese album was then produced and released on 18 November 2009. In her evidence the plaintiff stated that she was not given any details as to the distribution and the sales figures of the album. She had made enquiries but was informed by the defendant that the local distributor had run away and as such they were unable to give her any figures. The said Chinese album that was produced was never released in China, Hong Kong or Taiwan.

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[16] The defendant on the other hand denied the existence of any representations made to promote the plaintiff as an international artiste. DW5 in his witness statement said that Ahmad Izham had requested the defendant to produce and record an album for the plaintiff. In his evidence he said that the defendant had entered into an agreement with Alternate Records but he could not produce a copy of the said agreement.

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A 10. Q: How do you know about the plaintiff?

A: Previously I knew nothing about Suki, and through Encik Ahmad Izham the CEO of 8TV who have introduce me to her and he requested the Defendant to produce and record an album for Suki.

B 13. Q: Where is the original copy of the agreement?

C A: We have signed and now the original copy is at the possession of Alternate Records because it was sent to them for stamping. The original copy of the agreement is currently in their possession. We have requested a copy from them, however they have failed to produce the original copy to us. I was told by Ms Jacinta, the current manager of Alternate Records that they could not find the agreement. However the production of the music and the CD album were successful and there were no complaints from Monkey Bone.

D [17] The defendant did not produce its own copy or even a draft of the said agreement. The manager of Alternate Records a “Ms Jacinta” was also not called by the defendant to give evidence in support of the contention that the production fees for the album was in the estimate of RM376k. No documentary evidence was adduced in support of this:

E 17. Q: How much was the production fees for the production of the music CD

F A: We have submitted our album dated 5/2/2009 to Monkey Bone in the estimate of RM376,000.00 and thereafter we entered the agreement for the total of RM367,000.00

G [18] The 2009 agreement between the parties provided that the defendant will develop the plaintiff’s career on an exclusive basis and manage all of her works, engagement and professional affairs. Clause 3.1 of the agreement sets out the defendant’s obligations;

(a) to develop and promote the Artist Career;

H (b) to negotiate on the best available terms and/or to contract and/or to enter into contract for and behalf of the Artist to promote and develop the Artist Career subject to the standard of reasonableness and acceptability. A copy of the draft contract or contracts shall be made available to the

I Artist for purpose of her perusal and comments, if any, and discussion with Galaxy prior to execution of the contract or

- contracts and upon execution and stamping of the contract or contracts, a copy of same shall be extended to the Artist for her record purpose; **A**
- (c) to arrange for public appearance or performance at such legitimate and acceptable places/venues and at such times as is deemed reasonable in the circumstances either directly or indirectly with other performers and/or artist with or without remuneration; **B**
- (d) assisting in planning for the employment of the Artist in promoting the Artist Career and to provide advise to the Artist in all matters affecting the Artist's Career and interests in the entertainment industry; **C**
- (e) to decide for the use and/or exploitation and/or sale and/or other disposition of services and/or materials of that relates to the Artist Career; **D**
- (f) to decide on the pre and post production and/or material and/or services in relation to the Artist performance and/or work and/or career;
- (g) to endeavour to promote albums and/or songs; **E**
- (h) to make all necessary arrangement and advance all such necessary expenses in order to give intention to the promotion and development of the Artist Career;
- (i) to exploit and/or to reproduce the Artist's good will and/or name and/or logos and/or marks (if any) and/or personality and/or voices and/or photographs and/or autograph and/or musical and/or biographical material for the purpose of publicity and/or advertisement and/or merchandising and/or other commercial uses. **F**
- (j) to make all such necessary arrangement in relation to the Artist travelling schedule including transport, lodging and food for the purpose of promoting the Artist Career; **G**
- (k) to ensure that all products utilized by the Artist shall be original and shall not infringe the copyrights or any other rights of any third party worldwide and where material/work is based on or incorporates material/work of any third party, Galaxy shall obtain prior written permission/all relevant and necessary approvals and/or releases from the said party for use of such material; and **H**
- I**

- A (l) for avoidance of doubt the obligations on the part of the Galaxy cannot be sufficiently stated herein and the list of obligations may grow and/or increased gradually in promoting the Artist Career and the Artist agreed to give intention to the purpose of this agreement to promote and develop the Artist career.

B

- [19] There is no evidence, be it oral or documentary at all adduced by the defendant through their witnesses except for the evidence of DW5 they had in fact produced the album and had incurred the expenses as alleged. A total of RM367,575.17 was paid to the defendant as confirmed by the plaintiff supported by the payment voucher as well as the cheque on pp. 305-306 A1. It is also not provided or mentioned in any of the clauses in the 2009 agreement that the defendant will be producing the album and that the sum paid is for that particular purpose. DW5's reply to question 10 of his witness statement on whether there was any payment from Monkey Bone for the production of the plaintiff's album is as follows:

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- E Yes, there is payment total of RM367,575.17 for the production of the said album which is the total cost of the album.

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[20] The Court of Appeal in *Bekalan Sains P & C Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2011] 1 LNS 232 held:

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- G ..., when there is an offer and an acceptance of that offer, an agreement is in existence and the court will enforce it. In simple contract the agreement must be supported by consideration to establish the obligation. The parties too must intend the agreement to have legal force because the courts will only enforce what the parties intend should be enforced. The parties must also agree that their agreement must be mutual. And the parties must also be legally capable of reaching a binding agreement and, finally, the subject matter of their agreement must be legal.

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- I In deciding whether the parties have reached an agreement, the law looks for an offer by one party and an acceptance to the terms and conditions of that offer by the other. There would be a bargaining process leading up ultimately to an agreement or meeting of the minds. This is the traditional method of analysis of an offer and an acceptance which has been applied by the courts in determining the formation of the contracts. But for a contract to be formalised, all the terms and conditions must be fulfilled. The failure to fulfil a term or a condition would not give rise to a concluded contract.

[21] Abdul Malik Ishak J in *Sulisen Sdn Bhd v. Kerajaan Malaysia* [2006] 7 CLJ 247 sets out the following guideline: A

The law of contract is concerned with the mechanics involved in and the principles regulating the formation, performance, continuance and discharge of the parties individually created obligations. The essential elements of any contract are: B

(i) offer;

(ii) acceptance;

(iii) consideration (not required for contracts under seal); C

(iv) intention to be bound;

(v) mutuality;

(vi) capacity; and D

(vii) legality.

The offer and acceptance when taken together would form the “agreement” and that agreement must be supported by consideration in order to establish the obligation. It is the parties that must intend that the agreement to have legal force and the courts will only enforce what the parties intend should be enforced. The parties too must agree on the same thing and this would be known as mutuality. The parties too must have the capacity of reaching a binding agreement and the subject matter of the agreement must be legal. Briefly, these are the seven essential elements that must be present before a contract is said to be in existence. E

[22] Gopal Sri Ram JCA (as he then was) in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 said: F

... a party to a contract who, after having concluded his bargain, entertains doubts as to the wisdom of the transaction may be in the unfairly advantageous position to invent all sorts of imaginary terms upon which disagreement may be expressed when the more formal document is being prepared in order to escape from his solemn promise. Businessmen would find the law to be a huge loop-hole and commerce would come to a virtual standstill. H

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- A The law leans in favour of upholding bargains and not in striking them down willy-nilly. And its declared policy finds expression in the speech of Lord Wright in *Hillas & Co. v. Arcos Ltd.* [1932] All ER (Rep.) 494, where he said:
- B Businessmen often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business, may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without
- C being, too astute or subtle in finding defects; but, on the contrary, the court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are
- D appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as matter of machinery where the contractual intention is clear ...
- E [23] In *Sri Kajang Rock Products Sdn Bhd v. Mayban Finance Bhd & Ors* [1992] 1 CLJ 204; [1992] 3 CLJ (Rep) 611, VC George J (as he then was) explained the meaning of the word “contract” in these words:
- F To constitute a valid contract there must be separate and definite parties thereto; those parties must be in agreement, that is there must be a *consensus ad idem*; those parties must intend to create legal relations in the sense that the promises of each side are to be enforceable simply because they are contractual promises and as clear and helpful an enunciation of the principles as any which
- G should guide the court in determining the ever recurring question of whether there has been a contract between the parties is provided by Seville J. in *Vitol B. V. v. Compagnie Europeene des Petroles* [1988] 1 Lloyd’s Rep. 574, at 576 in the following words: The approach of the English law to questions of the true construction of contracts of this kind is to seek objectively to
- H ascertain the intentions of the parties from the words which they have chosen to use. If those words are clear and admit of only one sensible meaning, then that is the meaning to be ascribed to them - and that meaning is taken to represent what the parties intended. If the words are not so clear and admit of more than
- I one sensible meaning, then the ambiguity may be resolved by looking at the aim and genesis of the agreement, choosing the

meaning which seems to make the most sense in the context of the contract and its surrounding circumstances as a whole. In some cases, of course, having attempted this exercise, it may simply remain impossible to give the words any sensible meaning at all in which case they (or some of them) are either ignored, that is to say, treated as not forming part of the contract at all, or (if of apparent central importance) treated as demonstrating that the parties never made an agreement at all, that is to say, had never truly agreed upon the vital terms of their bargain.

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[24] Based on the facts and evidence the defendant had agreed to produce an international album and represented through DW5 they were going to manage as well as to promote the plaintiff as an international artist. DW5, did make representations to the plaintiff that the defendant has the capability and the ability to promote her career internationally. This was confirmed by the plaintiff and PW2. PW2 was present when the representations were made,

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The second meeting was to discuss about Suki's future. Yes there were discussions producing an international album ... hope to go beyond the Malaysian market. Galaxy did informed they had connections in the Taiwan market ... very reputable organizations.

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[25] PW2 was asked in cross-examination whether the defendant had given a guarantee that they will produce an international Chinese album that can sell PW2 replied,

No guarantee but there were implications that they could produce international album.

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[26] Unfortunately no specific provision was incorporated in the agreement to specifically provide that the defendant will promote the plaintiff to be an international artiste or to promote the album in China, Taiwan and/or Hong Kong even though the plaintiff had reminded the defendant of it.

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[27] The Federal Court in *Morello Sdn Bhd v. Jaques (International) Sdn Bhd* [1995] 2 CLJ 23 held:

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For the purposes of construction of contracts the intention of the parties is the meaning of the words they have used. Hence, the question to be answered always is "what is the meaning of what the parties have said" and not "what did the parties mean to say".

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A [28] The plaintiff was under the mistaken belief that there exist
an agreement *albeit* an oral one, based on the representations made
by the defendant, in particular DW5. Unfortunately for reason
only known to the defendant no provisions were incorporated in
the agreement even though the plaintiff had constantly reminded
B the defendant of it. However, the facts and the evidence disclosed
that there were communications between the defendant and the
plaintiff which had induced the plaintiff to enter into the agreement
in April 2009 and releasing the said amount to the defendant. The
defendant indicated they had the wide experience and skill in the
C field and business of the production and artist management in the
music industry. Believing in these representations by the defendant,
the plaintiff entered into agreement with the defendant.

D [29] It was amongst these myriads of discussions, meetings and
negotiations which ultimately culminated in an agreement dated
10 April 2009. I have perused the terms of the agreement and
come to the following conclusion:

E (i) The agreement entered between the plaintiff and the
defendant dated 10 April 2009 is partisan to one party. The
agreement is clearly heavily one sided. Most of the provisions
seem to give the defendant anything and everything. The
agreement allows so much freedom as it were to the defendant
to do everything under the sun and the plaintiff is left with
F such onerous provision that is so pervasive to any normal
sense of just and fair play.

G (ii) The representations made by the defendant in particular DW5
to promote the plaintiff as an international Chinese artist are
not in any way or form reflected in any of the provisions in
the agreement.

(iii) No provisions on the payment of the RM367k or the purpose
of the payment.

H (iv) No provisions relating to the production of the album.

I (v) The purported recording agreement between alternate music
and the defendant was never tendered by the defendant as
evidence.

[30] The payment of the RM367,575.17 was made after the 2009 agreement was entered into. What was the purpose of the payment? Was it in consideration of managing and promoting the plaintiff? Or was it for the production of the album? DW5 said in evidence it was for the cost of producing the album but did not produce any accounts to show the cost of producing the album or any evidence that the defendant had actually produced the said album. The defendant gave evidence that the agreement to produce the album was made between with Alternate Music but no agreement was tendered by the defendant.

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[31] To render a transaction as being unfair and unconscionable there must be some evidence of victimisation or taking advantage of another's weakness that will lead the court to come to that conclusion. In the instant case the plaintiff at the time of signing of the agreement was 19 years old. The plaintiff was still inexperienced with regards to the music industry but as a budding artiste she was and still is full of hope and ambition. The plaintiff did request Ms Sarala Menon, an advocate and solicitor (DW4) to go through the agreement. However, she was never engaged by the plaintiff for the purpose of this agreement. DW4 gave evidence that the plaintiff was a former client and she had a quick look and but did not comment or render any advice to the plaintiff,

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Miss Low is a former client of mine. She came to see me and gave a copy of this ... I assumed it is the same. She asked me to have a quick look and let her know whether the agreement was ok. I had a look at it and I told her the agreement was actually against her.

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[32] In cross-examination DW4 confirmed,

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I was not engaged I was asked to look at the agreement and to witness ... as a favor she was a former client ... she never paid me. I was not engaged in the drafting or signing except whether the agreement was acceptable or not.

[33] The plaintiff's position is analogous to a ballerina in a music box. The defendant holds the key and can wind on the music box as and when it wishes. The plaintiff is the little ballerina in the music box and will move and dance as and when the defendant winds it up. Based on the facts and evidence the defendant had agreed to produce an international album and to manage the

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- A plaintiff as well to promote her as an international artist. DW4 did make the representations to the plaintiff that the defendant has the capability and the ability to promote her career internationally. Having a role in one obscure TV drama in Taiwan and also a music video filmed in Taiwan does not make a person an
- B international star or artiste. Neither can one be considered an international artiste if one or two of the songs were composed by a composer who is not a Malaysian. There must be honest and sincere efforts on the part of the defendant which I find in this case based on the facts and evidence sorely lacking.
- C [34] The principle concerning “unconscionability” was initially propounded by Lord Denning in the case of *Lloyds Bank v. Bundy* [1975] QB 326 where it was held that unconscionable transaction between parties may be set aside by the court of equity. This to
- D extend to all cases where unfair advantage has been gained by an unconscientious use of power by a stronger party against a weaker (see also: *Halsbury’s Law of England*, 3rd edn., vol. 17, 1956 at p. 682).
- E [35] It is not possible to define “unconscionability” other than to give some very broad indications such as lack of *bona fides*. What kind of situation would constitute “unconscionability” would have to depend on the facts of each case. This is a question which the court has to consider on each occasion where its jurisdiction is invoked. Whether or not “unconscionability” has
- F been made out is largely dependent on the facts of each case. In every case where “unconscionability” is made out, there would always be an element of unfairness or some form of conduct which appears to be performed in bad faith. It is clear in this instant case there was an element of unfairness on the part of the
- G defendant.
- [36] In *Fui Lian Credit & Leasing Sdn Bhd v. Kim Leong Timber Sdn Bhd & Ors* [1991] 1 CLJ 522; [1991] 2 CLJ (Rep) 614, (this case was referred to by the courts in the aforementioned cases)
- H Chong Siew Fai J (as he then was) said at p. 526 (p. 619) said:
- I In order that a party may free himself from complying with an agreement he had entered into, he must show that the bargain or some of its terms was unfair and unconscionable. It is not enough to show that, in the eyes of the court, it was unreasonable. A bargain cannot be unfair and unconscionable unless it is shown that one of the parties to it has imposed an objectionable term in

a morally reprehensible manner, that is to say, in a way which affects his conscience or has procured the bargain by some unfair means. *Multiservice Bookbinding Ltd. & Ors. v. Marden* [1987] 2 All ER 489.

A

[37] His Lordship Chong Siew Fai J, cited the case of *Alec Lobb (Garages) Ltd & Ors v. Total Oil G.B. Ltd* [1985] 1 All ER 303 (CA), (at p. 620):

B

In *Alec Lobb Ltd. v. Total Oil G.B. Ltd.*, Dillon LJ rejected the contention that where there was unequal bargaining power, the test was whether its terms were fair and reasonable and that it was unnecessary to consider whether the conduct of the stronger party was oppressive or unconscionable. He went on (p. 313):

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Inequality of bargaining power must anyhow be a relative concept. It is seldom in negotiations that the bargaining powers of parties are absolutely equal. An individual wanting to borrow money from a bank, building security or other financial institution in order to pay his liability or buy name property he urgently wants to acquire will have virtually no bargaining power; he will have to take or leave the terms offered to him. So, with house property in a seller's market, the purchaser will not have equal bargaining power with the vendor. But Lord Denning MR did not envisage that any contract entered into in such circumstances would, without more, be reviewed by the courts by the objective criterion of what was reasonable: see *Lloyds Bank Ltd. v. Bundy* [1974] QB 325 at 336. The courts would only interfere in exceptional cases where as a matter of common fairness it was not right that the strong should be allowed to push the weak to the wall. The concept of unconscionable conduct and of the exercise by the stronger of coercive power are thus brought in.

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[38] The English Court of Appeal in *Alec Lobb* held that:

... where one party had acted extortionately, oppressively or coercively towards the other, the court would in fairness set aside a transaction so made. However, a transaction was not rendered harsh or unconscionable merely because the parties are of unequal bargaining power and the stronger party had not shown that the terms of agreement was fair, just and reasonable. Furthermore, a transaction was not unconscionable merely because a party was forced by economic necessity to make it. On the facts, although the plaintiffs had no realistic alternative, no pressure had been exerted on them by the defendant, which was reluctant to enter into the transaction, and furthermore the plaintiffs themselves had

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- A sought the defendant's assistance to avert financial collapse and had sought the prior advice of their solicitors and accountant, which they had chosen to ignore. Accordingly the judge was right to find that the defendant's conduct was not unconscionable or oppressive ...
- B [39] Clement Skinner J (as he then was) in *Standard Chartered Bank Malaysia Bhd v. Foreswood Industries Sdn Bhd & Anor* [2004] 6 CLJ 320 referred to the case of *Saad Marwi v. Chan Hwan Hua & Anor* [2001] 3 CLJ 98 where the Court of Appeal adopted the English doctrine of inequality of bargaining power and applied it in a broad and liberal way in Malaysia.
- C [40] Clement Skinner J in the *Standard Chartered Bank Malaysia Bhd's* case said that:
- D ... To render a transaction as being unfair and unconscionable there must be some evidence of victimisation or taking advantage of another's weakness or of actual or constructive fraud or other circumstances that will lead the court to come to that conclusion. But as I said earlier, no such circumstances have been shown here by the first defendant that would cause the court to say that the allegations need to be investigated further at a trial.
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- F [41] In the instant case based on the facts and evidence, the plaintiff was taken advantage of by the defendant. She was given the promise by the defendant that she will be promoted as an international artiste but aside from appearing in concerts with other international artiste/acts and in a Taiwanese drama no other efforts were made by the defendant.
- G [42] On an application for relief against unconscionable conduct, the court looks to the conduct of the party attempting to enforce, or retain benefit of a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. (See: *Commercial Bank of Australia Ltd v. Amadio and Another* [1983] 46 ALR 402). In the instant case evidence adduced during the trial clearly points out that there was a gross unfairness and unequal bargaining powers.
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- I [43] In the Singapore High Court, Lai Kew Chai J in the case of *Min Thai Holdings Pte Ltd v. Sunlable Pte Ltd & Anor* [1999] 2 SLR 368 opined that "the concept of unconscionability involves

unfairness, as distinct from dishonesty or fraud, or conduct so reprehensible or lacking in good faith that a court of conscience would either restrain the party or refuse to assist the party".

[44] Based on the foregoing reasons this court finds that the plaintiff have proved its case on the balance of probabilities against the defendant in particular that the agreement between the parties is unconscionable and inequitable. Accordingly I made the following orders:

- (i) that the agreement between the plaintiff and the defendant dated 10 April 2009 is set aside;
- (ii) the amount of RM367,575.17 be returned to the plaintiff; and
- (iii) cost of RM30,000 to be paid forthwith to the plaintiff.

[45] With regards to the counterclaim the defendant fail to prove its case against the plaintiff on a balance of probabilities. Moreover the 2009 agreement between the parties have been set aside by this court.

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